No. 16,173

United States
Court of Appeals
For the Ninth Circuit

PETER CROCKETT JACKSON, a minor, by John E. Walker, his Guardian ad Litem,
Appellant,

vs.

THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association; DAVID LLOYD DAVIES; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES, as Executors under the purported will and testament of MARIA C. JACKSON, deceased; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES and WILLIAM W. KNIGHT, as purported Trustees appointed by said purported last will and testament; and BLACK WHITE FOUNDATION, a corporation,
Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE
(See footnote below)

1. The Record

This action was commenced on August 22, 1956, by filing the original complaint (R. 6-20). In form, the com-

Note:
As used in this brief, unless otherwise indicated,
"Original complaint" means the complaint filed August 3, 1956 (R. 6-20) as amended August 22, 1956 (R. 21-23).
"Amended complaint" means the First Amended Complaint filed January 2, 1958 (R. 55-75).
"Will" means the original will dated January 7, 1948 (R. 75-84) and the four codicils thereto (R. 84-98).
"App." means an appendix to this brief.
"Op. Br." refers to the Opening Brief of Appellants.
Italics in quoted matter are ours unless otherwise indicated.

plaint stated only a single claim. Rule 10 (f). It alleged grounds for contesting parts (but not all) of the will of Maria C. Jackson on charges that those parts were not actually her will but were fraudulently drawn to reflect the purposes and desires of her son, Philip, and her legal advisers "and not her own" (R. 13; 16).

The original complaint also alleged, as part of the charges of fraud, that Mrs. Jackson's advisers induced her to set up an invalid trust from which they might benefit (R. 17), and that they had failed to reveal the existence of a new will or codicil with provisions more favorable to appellant than those in the will (R. 17-18).

Admittedly relying on *Richardson v. Green,* 61 Fed 423, as authority for Federal jurisdiction over Oregon will contests (Op. Br. 26), appellant filed his original complaint to institute such a contest.

On motion of appellees (R. 24), the action was dismissed by District Judge Mathis for want of Federal jurisdiction over the contest, but without prejudice (R. 112-113). The reasons for the dismissal were stated by Judge Mathis in a Memorandum of Decision dated June 26, 1957 (R. 24-54). In this Memorandum Judge Mathis observed that the original complaint asserted at least four separate claims or causes of action, although not separately stated (R. 27). It will be noted that the presence of multiple claims in the complaint was first recognized by appellant some time after it had been pointed out by Judge Mathis.

On January 2, 1958, appellant filed a First Amended Complaint with substantially the same allegations as those in the original complaint, but rearranged and divided into six separate claims (R. 55-75). Appellees renewed their

motion to dismiss and it was granted (R. 112-113). No further memorandum of this ruling was filed by Judge Mathis. However, the order of dismissal recited that "the first amended complaint presents in substance nothing more than a rearrangement of the claims asserted in the original complaint," and that "the motion to dismiss should be granted upon the grounds and for the reasons stated upon dismissal of the original complaint" (R. 112-113). The case is here on appeal from a judgment of dismissal entered pursuant to that order (R. 114-115).

2. The Facts

Appellant's version of the facts was set out in his two complaints and repeated, with some amplification, in his Opening Brief. We are assuming that the allegations of his amended complaint, in so far as they directly state ultimate facts rather than conclusions and argument, are to be taken as true for the purposes of this appeal. If the other or evidentiary facts stated so fully in appellant's brief have any relevancy on the jurisdictional issue presented on this appeal, which we doubt, then they should be considered, we think, in the light of the following additional facts appearing in the record:

(a) The original will was executed by Mrs. Jackson on January 7, 1948 (R. 84), some eight years prior to her death on February 3, 1956 (R. 6). During all of that time she admittedly was "of sound and disposing mind and memory" (R. 8; 56). In the 1948 will she left the bulk of her estate in trust with the income payable to Philip, her only living son, during his lifetime, and after his death in trust for the Jackson Foundation (R. 77-78), which is described in Article VI of the will (R. 79-82). Aside from Philip, her only living descendant was her great-grandson,

Peter, the appellant here (R. 8-9; 56). In the 1948 will Mrs. Jackson said that she was making no provision for Peter "because I know that he has been amply provided for in other ways" (R. 83). The truth of the quoted statement was not challenged in either of appellant's complaints.

(b) The charitable trust for the Jackson Foundation, alleged to have resulted from fraud perpetrated by Philip on his mother, is substantially the same as one created by Philip himself in his own will (R. 103-106).

(c) After the death of Philip, Mrs. Jackson, by the third codicil to her will (R. 89), added $150,000 to the "ample" provision previously made for appellant (R. 83), and this bequest was confirmed by the fourth and last codicil (R. 97-98). Appellant accepts this bequest in his favor (Op. Br. 17-18), notwithstanding his assertion that there was a later will or codicil (R. 69-70) which, if it ever existed, may have cancelled or reduced the $150,000 bequest.

(d) Appellant did not allege in his complaint, and does not contend in his brief here, that Mrs. Jackson ever intended to give appellant what he now seeks—substantially the entire estate immediately and absolutely.

3. The Claims

From the jurisdictional point of view, we think the most that properly can be contended for by appellant is that his complaint contains claims of two classes:[1]

First, those which assert that the writings purporting to constitute Mrs. Jackson's will were not in fact her will. This class would include the charges of fraud (fourth

1. This classification does not include the so-called sixth claim, which actually is nothing more than a prayer for particular relief in the event that certain of the other claims should be established.

claim), undue influence (fifth claim), and the execution of a new will or codicil (third claim)[2]. These claims will be referred to collectively in this brief as the "will contest".

Second, those claims which challenge the validity of the will, or parts of it, on grounds which appear on the face of the will itself. This class would include the charges of indefiniteness and uncertainty (first claim) and violation of public policy by tax avoidance and creation of a perpetuity (second claim). These claims will be referred to in this brief, as they were by Judge Mathis (R. 50; 52), as "subsidiary claims".

Until there has been a final determination of the will contest by a court of competent jurisdiction, the subsidiary claims will remain purely hypothetical; and if appellant should ultimately prevail in the will contest, the subsidiary claims would become moot.

Appellant in his brief here, as in his amended complaint, has shifted the emphasis reflected in his original complaint, and has presented the hypothetical or moot claims first. We shall reverse that order of presentation and discuss first the basic question of Federal jurisdiction over the will contest.

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2. Appellant indicated that Judge Mathis, in his Memorandum of Decision, held that his court had jurisdiction of the third claim (Op. Br. 34-35). We do not so read the Memorandum (R. 47; 52).

PART I—THE WILL CONTEST

As indicated above, appellant attacks only a part (Article VI) of the will and accepts the remainder (R. 71; 74-75; Op. Br. 17-18). Assuming that this can be done in this instance, the attack on Article VI on the grounds asserted is nonetheless a will contest. *Allen's Estate* (1925), 116 Or 467, 499; 241 Pac 996, 1006; *Kelley's Estate* (1935), 150 Or 598, 627; 46 P2d 84, 95.

The amended complaint, like the original, set out a series of alleged frauds and deceptions on the part of Mrs. Jackson's advisers which, it is asserted, caused her to include Article VI in her will, and concluded:

> "By so doing, they were able to and did overcome her volition to the extent that, although she desired to provide for plaintiff as aforesaid, she, nevertheless, executed a will which reflected the purposes and desires of Philip and defendant Davies and not her own" (R. 66).

Later, in the amended complaint, there are additional references to alleged fraud and undue influence whereby, it is alleged, that in Article VI

> "the will and desires of defendant Davies after Philip's death were substituted for the will and desires of Mrs. Jackson" (R. 72).

These, in short, are plain allegations that Article VI was not the will of Mrs. Jackson. Consequently, this entire case involves only certain provisions which appellant claims never were any part of Mrs. Jackson's will.

The above quoted excerpts from the amended complaint, together with preceding allegations, show the grounds on which appellant claims that Article VI was not the will of

Mrs. Jackson. An attack on that Article based upon the grounds so indicated, is clearly a will contest in the legal sense as well as in common parlance. Fraud and undue influence are among the most common grounds for will contests in Oregon, and were involved in most of the will contests decided by the Supreme Court of Oregon, as shown by Appendix D to this brief. We contend that such attacks remain will contests no matter how they may be designated by the pleader, or how they may be commingled with other causes of action.

In our treatment of the jurisdictional issue, we shall first discuss the rules which determine Federal jurisdiction in probate matters (subject A below), and then take up their application here in view of the Oregon probate system (subject B below).

A—Federal Jurisdiction in Probate Matters

1. *Federal Courts do not have jurisdiction of will contests arising in states wherein such contests are proceedings in rem triable only in the probate courts as a part of the probate of the will.*

The historical background for this rule is summarized lucidly in Judge Mathis' Memorandum of Decision (R. 24-25). Specific applications of the rule are illustrated in the cases cited in the Memorandum. There are many additional cases to the same effect; but we think those discussed below, covering a span of over a century, are sufficient to indicate how firmly the rule has been established.

Gaines v. Chew (1844), 2 How 619 (cited often by appellant, Op. Br. 22, 31, 32, 36, 45, 46, 58, 60, 63), arose in Louisiana where the civil law prevails. It was a suit insti-

tuted in the Federal Court by Myra Gaines, as sole heir at law of Daniel Clark, to set aside proceedings for the probate of a will executed by Clark in *1811* on the ground that the *1811* will had been revoked by a later will executed by Clark in *1813* but fraudulently suppressed or destroyed by the defendants, who were named as executors of the *1811* will. The suit was instituted long after the probate proceeding had been closed and "the property of the decedent, both real and personal, had passed into the hands of purchasers" (2 How 649). The Supreme Court held that the Federal Court was without jurisdiction to set aside the probate of the *1811* will. (For further proceedings involving the Clark wills, see *Gaines v. Fuentes,* 92 US 10, discussed below.)

Broderick's Will (1874), 88 US 503, arose in California. It was a suit in equity to obtain relief much like that sought here—a decree declaring the will to be a forgery, setting aside the probate thereof, and charging as trustees those then in possession of the property of the estate. Following are excerpts from the opinion:

> "As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof." (p. 509)

> "The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills

on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." (pp. 509-510)

"There is nothing in the jurisdiction of the probate courts of California which distinguishes them in respect of the questions under consideration from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and all cognate matters usually incident to that branch of judicature." (p. 515)

Ellis v. Davis (1883), 109 US 485, which arose in Louisiana, involved the will of Sarah Ann Dorsey which had been admitted to probate by the state court having jurisdiction of probate matters. The suit was brought by next of kin in the Federal Court "to set aside the will as made under undue influence" (p. 486), to recover possession of certain lands, to obtain an accounting of rents and profits, and to cancel a deed made by the decedent during her lifetime. The suit was dismissed on demurrer by the lower court and its decree was affirmed by the Supreme Court. With respect to the will contest, the court said:

"It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far at least as it gave effect to the will as a muniment of title.

"It is well settled that no such jurisdiction belongs to the circuit courts of the United States, as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will,* 21 Wall. 503." (p. 494)

> "In *Payne v. Hook,* 7 Wall. 425, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res,* which is the subject of the litigation, is entitled to administer it." (p. 498). This case is discussed further below (post. . . .).

Farrell v. O'Brien (1905), 199 US 89, 50 L Ed 101, 25 S Ct 727, arose in the State of Washington. It was a suit to set aside a nuncupative will theretofore admitted to probate in the state court. The Supreme Court reviewed its prior decisions, including several cited by appellant in the present case, and stated the jurisdictional question as follows:

> "The question, therefore, reduces itself to a narrow compass, that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character or necessarily merely ancillary thereto, or do they confer upon the state courts general legal or equitable authority on the subject merely because of the existence of a controversy? That is to say, is a will contest under the laws of Washington an ordinary action or suit between parties or a special probate proceeding directly ancillary to or concerning the probate of the will?" (pp. 111-112)

The court then analyzed the Washington probate code, and observed:

> "We are of the opinion that the sections in question authorize a proceeding for contest only before the court which has admitted the will to probate or rejected the

application made for probate, and that the authority thus conferred concerning the contest is an essential part of the probate procedure created by the laws of Washington, and does not, therefore, cause a contest, when filed, to become an ordinary suit between parties." (p. 114)

The opinion on the jurisdictional question concluded as follows:

"It follows that as the Circuit Court of the United States had no jurisdiction to admit a will to probate, or to entertain a pure probate proceeding, and as the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes,* the Circuit Court of Appeals correctly decided that the Circuit Court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the non-existence of a will and the consequent nullity of the probate." (p. 116)

Sutton v. English (1918), 246 US 199, 62 L Ed 664, 38 S Ct 254, arose in Texas. The heirs brought suit to annul a will and partition the decedent's property. Upon analysis of the local statutes the Supreme Court concluded that in Texas such a proceeding was merely supplemental to the probate proceedings and cognizable only by the probate court, and hence that the controversy was not within the jurisdiction of the courts of the United States. The applicable rules were summarized as follows:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem,* matters of this character are not within the ordinary equity jurisdiction of the federal

courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a State, by statute or custom, gives to parties interested the right to bring an action or suit *inter partes* either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. *Broderick's Will,* 21 Wall. 503, 509, 512; *Ellis v. Davis,* 109 U.S. 485, 494, et seq.; *Farrell v. O'Brien,* 199 U.S. 89, 110; *Waterman v. Canal-Louisiana Bank Co.,* 215 U.S. 33, 43." (246 U.S. at 205)

The most recent decision of the Supreme Court, so far as we can determine, is *Wilson v. Simler* (1955), 350 US 892, 100 L Ed 98, 76 S Ct 153, reh. den. 350 US 943. Since the case was disposed of by a short *per curiam* opinion, it is necessary to review the lower court decisions.

Simler, as an heir at law of Birdine Fletcher, deceased, brought suit in the United States District Court of Oklahoma under the Federal Declaratory Judgments Act, to obtain a determination of the validity of a devise in the decedent's will to Sisters of St. Francis, an incorporated religious organization, on the ground that the devise violated an Oklahoma statute which allegedly prohibited such

an organization from holding real estate outside of an incorporated city or town. The District Court held (110 F Sup 761) that under the Oklahoma law the devise, in any event, would not be void but only voidable, and that plaintiff had no standing to contest its validity, and therefore dismissed the suit. However, the District Court held that "although the Will in question is now being probated in the state court doubtless this court has authority to *construe* the provisions of the Will", citing *Ferguson v. Patterson,* 191 F2d 584 (110 F Sup 762-3).

On appeal the Court of Appeals reversed and held the devise to be invalid (210 F2d 99). It concluded that the federal courts had jurisdiction because the same court in a prior decision (*Ferguson v. Patterson, supra*) had "reached the conclusion that the district courts in Oklahoma were vested with jurisdiction to entertain an original proceeding to determine the validity of a provision contained in a will, and that therefore a United States court in that state was clothed with like jurisdiction in an action of that kind, diversity of citizenship with the requisite sum in controversy being present." (210 F2d 102)

The Supreme Court granted certiorari and disposed of the case in this brief memorandum opinion, quoted in full:

> *"Per Curiam:* The petition for writ of certiorari is granted. The judgments of the Court of Appeals are vacated and the judgments of the District Court reinstated. *Sutton v. English,* 246 U.S. 199. See *Markham v. Allen,* 326 U.S. 490, 494; *Pufahl v. Estate of Parks,* 299 U.S. 217, 256. Mr. Justice Black dissents." (350 U.S. 892-3)

Express reliance on the cases cited in the *per curiam* opinion indicates that dismissal of the case was not ordered

on the ground assigned by the District Court, but on the want of jurisdiction of the subject matter.

Richardson v. Green (1894), 61 Fed 423, relied upon by appellant in instituting this suit in the Federal Court (Op. Br. 26) and discussed at length in his brief (Op. Br. 80-98), recognized the general rule to be as stated in proposition 1 above but concluded that the *Richardson* case came within the exception stated in proposition 2 below. This conclusion, we contend, resulted from a misunderstanding of the Oregon probate system (post, pp. 38-41), and not from any intentional departure from the basic principles previously established in the *Broderick* case.

2. *Federal Courts, when diversity exists, may take jurisdiction of a will contest arising in a state wherein such a contest is an independent plenary suit in personam and not a part of the probate proceeding.*

This qualification or exception to the general rule was pointed out in *Farrell v. O'Brien,* cited above. After reviewing prior decisions, the court stated these two general rules:

> "First. That, as the authority to make wills is derived from the State and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.
>
> "Second. That where a state law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes,* the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies." (199 US at 110)

The exception was applied in *Blacker v. Thatcher* (CCA, 9th; 1944), 145 F2d 255, heavily relied upon by the appellant here. (Op. Br. 23, 25, 36, 37, 40, 42, 44, 63, 72.) There this court recognized that

> "in states where the probate proceeding is purely one *in rem* and not a suit *inter partes,* sustainable in a court of equity, they (courts of the United States) can not entertain jurisdiction over a bill to set aside the probate of a will" (p. 258)

but pointed out that in Montana, where the will was probated, "the probate of an estate is a proceeding in a court of general jurisdiction" and that it "embraces proof of heirship and the contest of wills * * *" (p. 257).

3. *After the administration of an estate has been completed in the probate court and the proceeding has been closed, Federal courts have jurisdiction to set aside the probate decree for fraud if such relief could be obtained by an independent plenary suit in the state courts.*

Gaines v. Fuentes (1875), 92 US 10, involved the two Daniel Clark wills referred to in *Gaines v. Chew* above. In 1855, Myra Gaines petitioned the Louisiana state probate court to probate the *1813* will, and the petition was granted *ex parte.* Subsequently, she instituted in the Federal Court several suits to recover properties formerly owned by Clark to which she succeeded if the *1813* will were valid. To successfully defend such suits, the defendants would have to challenge the probate of the *1813* will, which they undertook to do on the ground that the testimony on which the will had been admitted to probate was insufficient and false. They concluded, however, that they were "unable to contest the validity of the alleged will so long as the

decree of probate remains unrecalled" (p. 11). They therefore instituted the present action in a Louisiana state court which "is invested with jurisdiction over the estates of deceased persons" (p. 10). Myra Gaines then sought to remove the action to the Federal Court but her application for removal was denied. The state court ultimately entered a decree annulling the *1813* will and revoking its probate. The case was taken to the Supreme Court on a writ of error to review the order denying the application to remove. The Supreme Court reversed, saying:

> "The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States." (pp. 20-21)
>
> "In the case of *Broderick's Will,* the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject

of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties." (p. 21)

Ellis v. Davis (1883), 109 US 485, cited and quoted above, also involved the law of Louisiana. It quoted from *Gaines v. Fuentes,* supra, and added:

"As that was a case in which the sole question decided was the right of the defendant to remove the cause from the State court to the Circuit Court of the United States, under the act of March 2d, 1876, 14 Stat. 558, it was assumed, and not decided, that the said suit brought in the State court was one which, under the laws of the State, its courts were authorized to entertain for the purpose of granting the relief prayed for. The point decided was, that if it were it might properly be transferred to a court of the United States.

"It remains, therefore, in the present case to inquire whether the complainants are entitled, under the laws of Louisiana, to draw in question, in this mode and with a view to the decree sought, the validity of the will of Sarah Ann Dorsey and the integrity of its probate.

"An examination of the decisions of the Supreme Court of Louisiana on the subject will disclose that a distinction is made in reference to proceedings to annul a will and its probate, according to the objects to be accomplished by the judgment and the relation of the parties to the subject. If the administration of the succession is incomplete and *in fieri,* and the object is to alter or affect its course, the application must be

made to the court of probates, which, in that case, has possession of the subject and exclusive jurisdiction over it. If, on the other hand, the succession has been closed, or has proceeded so far that the parties entitled under the will have been put in possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication in the courts of general jurisdiction, in which the legal title is asserted as against the will claimed to be invalid, making an issue involving that question." (pp. 498-499)

4. *Federal courts, when diversity exists, may take jurisdiction of controversies involving the interpretation or legal effect of a will, or claims of creditors or legatees and the like, which do not require a determination of whether a purported will is or is not in fact the will of the decedent.*

The distinction between this class of controversies on the one hand, and will contests on the other, runs through all of the leading cases on Federal jurisdiction in probate matters. It was recognized in most of the Federal cases cited in appellant's brief, of which the following are examples.

Woods v. Paine (CCD, R I; 1895), 66 Fed 807 (cited by appellant, Op. Br. 32, 36, 38, 53, 57, 62, 63), was a suit in equity instituted in the Federal court to declare void a charitable trust created by the decedent's will. The bill alleged that the will had been admitted to probate by the state probate court of Rhode Island, that the decree of probate had been affirmed by the supreme court of that state, and that "all legal proceedings in said matter are now ended in the state courts" (p. 807). No attempt was

made to contest the will in the Federal court. The District Judge said (p. 808):

> "The will having been established by authority competent for that purpose, there seems to be no doubt of the jurisdiction of this court to determine questions as to interpretation thereof in this case, in which the complainant is a citizen of Michigan, and all the respondents are citizens of Rhode Island. Compare In re Cilley, 58 Fed 977." (*Note:* The Cilley case held that the Federal court had no jurisdiction over a will contest.)

The court, however, sustained a demurrer to the bill on the ground that the charitable trust clearly appeared to be valid under the law of Rhode Island (p. 809).

Spencer v. Watkins (CCA, 8th; 1909), 169 F 378, was a suit in equity instituted by certain heirs to declare invalid a charitable bequest provided for in the decedent's will and to establish their right as such heirs to share in the property. No will contest was involved. The character of the suit is shown by the following excerpts from the opinion:

> "The suit was brought after the ordinary matters incident to probate and administration had been fully disposed of and when final distribution was at hand, and its object was to have the bequest of the residuary estate declared contrary to the laws of the state relating to the disposition of property for charitable purposes, and to secure for the complaining heirs their respective shares thereof upon the ground that the deceased had died intestate as to the estate in question." (p. 382)

> "This was a civil suit in equity, within the jurisdiction of the Circuit Court. It should be added that in purpose and effect it no more interfered with the probate court in its rightful custody of the estate than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on con-

tract." (pp. 382-383). This case is discussed further below (p. 54).

Markham v. Allen (1946), 326 US 490, 90 L Ed 256, 66 S Ct 296 (cited by appellant, Op. Br. 22, 25, 31, 35, 40, 63), was a suit brought by the Alien Property Custodian to determine whether he as such Custodian had succeeded to the interests of certain German legatees under the decedent's will. The will had been probated in the State Superior Court, and the estate was in the course of administration under the will when the suit was brought (326 US 492). The judgment of the District Court declared that the Custodian "had acquired the interests of the German Nationals in the estate of the decedent" and was entitled to receive same upon final distribution (326 US 493). No will contest was involved. In holding that the suit was within Federal jurisdiction, the Supreme Court said:

> "It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and Sec. 24 (1) of the Judicial Code, which is that of English Court of Chancery in 1789, did not extend to probate matters. * * * (citing cases)
>
> "But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. * * *" (citing cases) (p. 494)

The propositions stated above and the supporting authorities are sufficient, we believe, to define with reasonable certainty the limits of Federal jurisdiction in probate matters. They make it clear that the Federal courts would not have jurisdiction of an Oregon will contest, even between citizens of different states, unless such a contest is an independent suit *in personam* apart from the probate proceeding itself.

B—The Oregon Probate System

Appellant strived to describe the Oregon probate system so as to support the conclusion that will contests in Oregon are plenary suits *in personam* triable in its courts of equity. The description, however, is inaccurate in so many respects as to require a general explanation of the system in order to disclose the error in appellant's conclusion.

1. *Jurisdiction of Oregon Probate Courts*

The probate courts in Oregon were established by the State Constitution, which became effective upon the admission of Oregon into the Union in February, 1859. The pertinent provisions are set out in Appendix A to this brief. The Constitution vested in the county courts "the jurisdiction pertaining to probate courts" (Art. VII, §12). The probate jurisdiction thus vested in the county courts could not be taken away by the Legislature. *State v. McDonald* (1909), 55 Or 419, 430; 104 Pac 967, 971; 106 Pac 444.

Through most of Oregon history, probate jurisdiction remained exclusively in the county courts. This is significant because under the Constitution such courts had no general jurisdiction in either law or equity except "such civil jurisdiction not exceeding the amount or value of five

hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law" (Art. VII, §12). This was substantially the jurisdiction normally vested in justices of the peace during that period. Later, when the Legislature (under the 1910 amendment to Article VII, see App. A) by a series of acts transferred probate jurisdiction to the circuit courts, the jurisdiction so transferred was kept as separate and distinct from the general jurisdiction of the circuit courts as if such probate jurisdiction were still vested exclusively in the county courts (post, pp. 48-50).

The probate courts, though following the procedure in equity except as otherwise prescribed (ORS 115.010), have no general equitable jurisdiction whatever:

Burnside v. Savier (1876), 6 Or 154, 156; *Weill v. Clark's Estate* (1881), 9 Or 387, 391; *Richardson's Guardianship* (1901), 39 Or 246, 249; 64 Pac 390, 391; *Dunham v. Siglin,* (1901), 39 Or 291, 296; 64 Pac 661, 662; *Roach's Estate* (1907), 50 Or 179, 186; 92 Pac 118, 121; *Hillman v. Young* (1913), 64 Or 73, 81-82; 127 Pac 793, 795; *Burke's Estate* (1913), 66 Or 252, 256; 134 Pac 11, 13; *Elder's Estate* (1938), 160 Or 111, 115; 83 P2d 477, 478; *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666, 672; 182 P2d 969, 977-978; *Estate of Ott* (1951), 193 Or 262, 271-273; 238 P2d 269, 273; *Arnold v. Arnold* (1952), 193 Or 490, 502; 237 P2d 963, 969; *Putnam v. Jenkins* (1955), 204 Or 691, 697; 285 P2d 532, 535.

Conversely, the courts of general jurisdiction have no probate powers:

Wilamette Falls Co. v. Gordon (1876), 6 Or 176, 180-182; *Tustin v. Gaunt* (1873), 4 Or 305, 308-309; *State v. McDonald* (1910), 55 Or 419, 430; 104 Pac 967, 971-972;

Mansfield v. Hill (1910), 56 Or 400, 408; 107 Pac 471, 474; *Stevens v. Myers* (1912), 62 Or 372, 412; 126 Pac 29, 30-35; *Wilson v. Hendricks* (1940), 164 Or 486, 492; 102 P2d 714, 716; *Florey v. Meeker* (1952), 194 Or 257, 279; 240 P2d 1177, 1186.

We need cite only a few examples to show how carefully the Supreme Court has kept the two classes of courts within their respective jurisdictions. *Mansfield v. Hill* (1910), 56 Or 400; 107 Pac 471, was a suit in equity having for its main purpose (as did *Richardson v. Green*) the cancellation of a deed and a will of the decedent because of his alleged mental incapacity. With respect to the will, the court said:

> "Plaintiff seeks in this suit to have the will of Claude H. Mansfield cancelled on the ground that the testator lacked mental capacity to make it at the time of its execution, but the probate of the will in the *county court* is conclusive upon the plaintiffs in this suit, which is a collateral attack: Morrill v. Morrill, 20 Or. 96 (25 Pac. 362; 11 L.R.A. 155; 23 Am. St. Rep. 95). The constitution gives to the *county court* jurisdiction pertaining to probate."

Another and more recent example of proceedings to cancel a deed and a will because of the alleged mental incapacity of the grantor-testator is shown in *Keenan's Estate* (1956), 208 Or 223, 300 P2d 778. In that case the moving parties proceeded along the conventional lines prescribed by the Oregon statutes and decisions of the Oregon Supreme Court. They contested the will in the county court by proceedings under the 1893 Act (App. C), and brought suit in the Circuit Court to cancel the deed. While the two cases were consolidated for hearing in the Circuit Court on the issue of mental capacity, nevertheless they were

treated as two separate cases throughout. On appeal, the Supreme Court, sitting as a probate court, sustained the will; and while sitting as a court of equity, it cancelled the deed.

Another series of cases showing the sharp line of division between the respective jurisdictions of the probate courts and the courts of general jurisdiction, even though part of the subject matter may be within the jurisdiction of the one and a part under the jurisdiction of the other, are those involving wills alleged to have been made in violation of contracts. A recent example is *Florey v. Meeker* (1952), 194 Or 257; 240 P2d 1177, which was a suit to enforce specific performance of a contract between the decedent and his wife to make joint wills under which the plaintiffs would be the chief beneficiaries. The wife died first, her husband remarried, and then executed a codicil to the joint will whereby he made his second wife the chief beneficiary. After his death, the will and the codicil were probated in the usual manner. In the suit for specific performance the plaintiffs (appellants) claimed that the codicil was not properly executed—a contention which, if sustained, would have given the plaintiffs all of the relief sought by them in the suit for specific performance. But the Supreme Court held that the question so raised could not be determined in the suit in equity, and said:

> "* * * Any issue relative to the sufficiency of the codicil's execution was properly determinable in the court of probate. On April 26, 1948, more than six months prior to the institution of this suit, the probate court found that the second codicil was executed in compliance with the statutory requirements. Sections 18-201 and 18-401, OCLA. If appellants' contention had any merit, it should have been seasonably addressed to that court after the date of the order admit-

ting the codicil to probate. Section 19-208, OCLA, as amended by Ch. 185, Oregon Laws, 1945. This they did not do and are now barred. We must, therefore, accept the codicil as being statutorily sufficient as to form and as an adequate implement to modify the will it seeks to change." (194 Or 279-280; 240 P2d 1187).

(*Note:* Section 19-208, to which the court referred, is now ORS 115.180, and was originally section 4 of the 1893 Act relating to will contests, which is quoted in full in Appendix B.)

On the other hand, it is settled that the *probate court* has no jurisdiction to determine the validity or effect of a contract to make a will, but must probate the will as written, if otherwise proper, even though it may violate a valid contract enforceable by a suit in equity:

Burke's Estate (1913), 66 Or 252, 256-257; 134 Pac 11, 13; *Ankeny v. Lieuallen* (1942), 169 Or 206, 218; 113 P2d 1113, 1117; *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666; 182 P2d 969, 977-978; *Branchflower v. Massey* (1949), 187 Or 40, 47-48; 208 P2d 341, 345.

2. *General Character of Probate Proceedings in Oregon*

In 1862 the Legislature adopted a civil code which was set out in General Laws of Oregon, 1845-1864, compiled by Judge Matthew P. Deady. The 1862 Act contained a chapter on Wills (pp. 935-940) and a Probate Code (pp. 410-440), which have continued ever since without substantial change in basic outline. The principal provisions with which we are now concerned are set out in Appendix B to this brief. Except for ORS 115.180 (the 1893 Act discussed below), the statutes quoted in Appendix B are now in substantially the same form as when first enacted in 1862.

From the beginning it has been recognized in Oregon that the right to dispose of property by will, as well as the right of an heir (like plaintiff) to take property by descent, is purely statutory. *McDemid v. Bourhill* (1921), 101 Or 305, 312; 199 Pac 610, 912; *Lewis' Estate* (1939), 160 Or 486, 497; 85 P2d 1032, 1037. On that premise, the statutes of Oregon prescribe the qualifications of those who may make a will (ORS 114.020), the form, and manner of execution, of wills (ORS 114.030 and 114.040), and the methods by which a will may be revoked (ORS 114.110) and the effect of a revocation (ORS 114.120).

The statutes also prescribe the probate procedure necessary to make the will effective (ORS 115.010 to 115.200). This procedure is applicable not only to a will which can be produced for probate, but also to a will which has been "lost or destroyed" (ORS 115.120). It would apply, for example, to proof of the alleged "new will or codicil", if any existed, referred to in the complaint in this case (R. 69-70).

The procedure thus prescribed is exclusive; the will cannot be proved in the first instance in any tribunal other than the probate court. *Willamette Falls v. C. & L. Co.* (1876), 6 Or 176, 181. The rule in Oregon, unlike that in England, is that the will need not be re-proved in a court of general jurisdiction even though it may transfer title to land. *Jones v. Dove* (1877), 6 Or 189, 190-191.

After a will is so proved in the probate court, the order of that court admitting the will to probate is *res adjudicata* and immune to collateral attack in any other court. *Russell v. Lewis* (1870), 3 Or 380, 384; *Hubbard v. Hubbard* (1879), 7 Or 43, 44; *Brown v. Brown* (1879), 7 Or 286,

299-300; *Mansfield v. Hill* (1910), 56 Or 400, 408; 107 Pac 471, 474; *Thomas Kay Woolen Mills Co. v. Sprague* (DC Or 1919), 259 Fed 338, 342.

The statutes authorize and direct the probate court, when the administration of an estate is otherwise completed, to order "the payment of legacies and the distribution of the remaining proceeds of the personal property among the heirs or other persons entitled thereto" (ORS 11.310). Such a decree of distribution is likewise immune to collateral attack in any other court. *State v. O'Day* (1902), 41 Or 495, 499-501; 69 Pac 542, 544. And, as noted below, the probate code contains specific provisions for the contesting of wills (ORS 115.180).

It may be said by way of summary that Oregon created the right to transfer property by will, but only in the manner specifically prescribed by statute; that this right is also conditioned upon proof of the will, in a special type of court and in accordance with special procedures followed only by that court; and that such proceedings in that court (except upon appeal) are binding not only on all of the interested parties but also on all other parties and courts. In short, from the inception of the will to final distribution under it, every step is controlled by special statutes designed for application in one continuous process in one court.

3. *Pleadings and Process in the Probate Courts*

Oregon probate proceedings are governed by separate and special rules of pleading and process applicable only to them. Their special character becomes more readily apparent after first noting the procedure in ordinary suits and actions.

For plenary suits and actions, the original Oregon Code of 1862 adopted the code system of pleading and practice (Oregon Laws, 1843-1872, §§ 1 to 105) and has followed it, with minor variations, ever since (ORS 16.010 to 16.740). Oregon still maintains the old distinction between actions at law and suits in equity. (ORS 11.010 and 11.020; *Tooze v. Heighton* (1916), 79 Or 545, 552; 156 Pac 245, 247; *Spores v. Maude* (1916), 81 Or 11, 14; 158 Pac 169, 170-171.) While both are tried in the same court, their distinctive characteristics are as carefully preserved as if they were heard in different forums. (*Van de Wiele v Garbade* (1912), 60 Or 585, 589; 120 Pac 752, 753-754.) Both are plenary in character and must originate in courts of general jurisdiction. Both are commenced by the filing of a complaint (ORS 15.020), and their initial process is a summons (ORS 15.020). The usual provisions are made for answers, demurrers, motions, etc., as to both. The pleadings and procedure in both law and equity cases are the same except for such variations as may be necessitated by inherent differences in the types of relief sought.

For the probate courts, on the other hand, an entirely different type of procedure, summary in character, is prescribed. The statute provides that "the court exercises its powers by means of:

(1) A citation to the party.

(2) A verified petition of a party in interest.

(3) A subpoena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees." (ORS 115.010)

This limitation on the means by which probate courts may exercise their powers is accompanied, however, by the following general provisions in the same section:

> "No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute."

This general provision, as will be noted later, was only a succinct way of saying that in those incidental procedural matters (such as mode of trial, exceptions to court rulings, and the like) wherein the practice in suits in equity differs from that in actions at law, the probate court is to follow the equity practice.

Appellant has sought to discount the clear statutory distinction between probate proceedings and suits in equity by referring to the historical use of such terms as "petition", "citation", "subpoena", etc., in equity practice (Op. Br. 70-71). Admittedly, the Oregon Legislature could have used such terms, with their ancient meaning, in prescribing procedure in suits in equity; but the important fact here is that the Legislature did not do that. By using different terms in prescribing the two different types of procedure, the Legislature indicated clearly that the two procedures were not intended to be the same. The general reference in ORS 115.010 (quoted above) to procedure "in the *nature* of a suit in equity as distinguished from an action at law" will be discussed later under another heading (post, pp. 49-50).

4. *Proof of Wills in Common Form and in Solemn Form*

Oregon still maintains the ancient distinction between proof of wills in *common* form and proof in *solemn* form. The common form suffices in the absence of a contest; the solemn form must be used if the will is contested.

The first step in probating a will is the filing of a petition for its probate (ORS 115.020). Upon the ex parte testimony of the subscribing witness, given either orally or by affidavit,[1] the will may be admitted to probate and letters testamentary issued to the executor (ORS 115.170 and 115.190). The executor must, "immediately after his appointment, publish notice thereof" in a newspaper once a week (or oftener if the court so directs) for four successive weeks (ORS 116.505), which serves as public notice of the probate of the will. In the absence of a contest, the foregoing constitutes the proof of the will. This process is referred to as proof in *common* form. In the great majority of cases, no further probate ever is required.

But at any time within six months after the will has been probated in common form (or later if the contestant is laboring under a legal disability), any person interested may contest the will or the order admitting it to probate (ORS 115.180). In the event of such a contest, the statute provides, "the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity" (ORS 115.170 (3)). Proof of the will in this manner is referred to as probate in *solemn* form.

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1. A witness who testifies by affidavit may be required, at any time within the next 30 days, to appear and testify orally in the probate court, or, if outside the state, to testify by deposition taken in the usual manner. ORS 115.170 (2). Use of affidavits instead of oral testimony was first provided for in Chapter 97, Oregon Laws, 1921, now codified as ORS 115.170.

The net effect is that whenever a will is contested, the probate in common form is nullified and the proponent must then re-prove the will *de novo* in solemn form just as if there had been no prior probate of the will. This was explained in the early case of *Hubbard vs. Hubbard* (1879), 7 Or 42, 44-45, as follows:

> "It is claimed by counsel for appellants that where a will has been probated 'in common form', or by proceedings wholly *ex parte,* as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to reprobate the same *de novo,* by original proof, in the same manner as if no probate thereof had been had. This proposition we think is correct, if the allegations are sufficiently broad to question the validity of the will, and the competency of the proof as to its execution. In every such proceeding the *onus probandi* lies upon the party propounding the will; and he must prove every fact, which is not waived or admitted by the pleadings, necessary to authorize its probate in the County Court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative."

The *Hubbard* case was followed by a series of others to the same effect. *Luper v. Werts* (1890), 19 Or 122, 23 Pac 850; *Mendenhall's Will* (1903), 43 Or 542; 73 Pac 1033; *Sturtevant's Estate* (1919), 92 Or 269, 178 Pac 192, 180 Pac 595; *Wendl v. Fuerst* (1913), 68 Or 283, 136 Pac 1; *Riggs' Estate* (1926), 120 Or 38, 250 Pac 753; *Davis' Will* (1943), 172 Or 354, 142 P2d 143; *Southman's Estate* (1946), 178 Or 462, 168 P2d 572. In *Johnson's Estate* (1921), 100 Or 142, 159; 196 Pac 385, 390, the court referred to the cases up to that time as follows:

> "Since the early case of *Hubbard v. Hubbard*, 7 Or. 43, it has been the rule that where a will has been pro-

> bated in common form, and its validity has been attacked by direct proceedings, it is incumbent upon the person propounding the will to re-probate the same by original proof in the same manner as if no probate thereof had been had."

5. *A Will Contest Is a Part of the Probate Proceeding*

A will contest in Oregon is only a means of requiring probate of the will in solemn form. Once the ex parte probate is challenged by the contest, the proponent must prove the will in solemn form before the only court authorized to take such proof, namely, the probate court (*Mansfield v. Hill* (1910), 56 Or 400, 408; 107 Pac 471, 474), in which all Oregon will contests have been tried since the Oregon code was adopted in 1862. (See App. D)

In effect, the contest is nothing more than a denial of what the proponent is required to prove to entitle the will to probate. As stated by the Supreme Court of Oregon in *Stevens v. Myers* (1912), 62 Or 372, 412; 121 Pac 434; 126 Pac 29, 34:

> "No matter whether the proceeding is for probate of the will in common form or in solemn form, whether *ex parte* or contested, whether it was commenced in the probate court or the district court of the territorial regime, or in the present day county court, all that is accomplished in any of the proceedings in question is that the proponent, with the affirmative of the issue resting upon him, either succeeds or fails in his attempt to prove the will. From whatever point we view the case, it is still the probate of a will—neither more nor less."

It follows that so far as contested wills are concerned, the only probate involved is the one made in solemn form. It is not merely a *part* of the probate; it becomes, by the

contest, *the probate* of the will. Nothing to the contrary ever has been said, or even suggested, by the Supreme Court of Oregon.

If there ever was any basis for contending that an Oregon will contest is something separate and apart from the probate of the will, we submit that any such basis was completely destroyed by the 1921 Act (Ch. 97, Or. Laws, 1921, now ORS 115.170) cited above (p. 30). This act consisted of a single section covering probate of wills in common form, contests of wills, and probate in solemn form—all treated as part of a single probate proceeding. The Act plainly negatives any possible suggestion that the parties are expected to jump back and forth between the probate court and the circuit court as the proceeding progresses from one stage to another.[1]

6. *The Probate of a Will, Including Any Contest of It, Is a Proceeding in rem*

The proposition that the probate of a will is a proceeding *in rem,* is too well established to require citation of supporting authority. Appellant seems to recognize this but undertakes to segregate a will contest from the rest of the probate process and give it a different classification—a proceeding *in personam.* This is justified, he contends, by certain peculiarities in Oregon probate law. But before examining the Oregon law, let us first take note of the reasons why will contests are generally regarded as proceedings *in rem.*

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1. Appellant cites the provision that in proving the will in solemn form the facts shall not be proved by affidavit "but in the *same manner* as such questions of fact are proved in a suit in equity", and treats the quoted language as if it said that the facts shall be "tried *in* a suit in equity" (Op. Br. 67).

Some of the reasons are stated in the decisions of the Supreme Court of the United States in the cases cited above. See, for example, *Broderick's Will* (1874), 88 US 503, 509, in which the court said:

> "* * * the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem,* in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of injustice and fraud; and that the result attained should be firm and perpetual." (88 U.S. 509)

Even in jurisdictions in which will contests are treated as separate independent suits, the great majority of the courts hold that the contest, like the original probate, is a proceeding *in rem.* The general rule was thus stated in Bancroft's Probate Practice (2nd Ed.):

> "The proceeding (will contest), although called a 'contest' is still neither more nor less than one to probate a will. The proceedings are, however, *in rem.* They are proceedings to determine the legal status of a written instrument. The world is bound by them and all parties in interest may be, or are, parties." (Vol. I, Sec. 162, pp. 392-393)

The reasoning which supports the quoted conclusion can be found in numerous cases. One example is *Mitchell v. Nixon,* (CCA 5; 1952), 200 F2d 50, a suit to contest a will which had been admitted to probate in a state *Probate*

Court of Arkansas. The Arkansas statutes provided that a will so admitted to probate could be contested by a suit in the state *Circuit* Court. Plaintiffs, being non-residents, attempted to contest the will by a suit in the Federal District Court, which dismissed the suit for want of jurisdiction over the subject matter. The Circuit Court of Appeals affirmed. After referring to the Arkansas statutes, the court said:

> "These statutory provisions demonstrate that the contest of a will subsequent to its probate, is but an extension of the probate proceeding—a proceeding not inter partes but *in rem.* (citing cases) It is true that some of the cases do contain language which gives rise to an inference that a proceeding in rem to contest a will partakes, at least to some extent, of the nature of a suit inter partes; however, the clear weight of authority fully sustains the proposition that the contest which may be instituted following admission to probate is but an extension of the time of contest and in effect, but another form of defense to the probate. Obviously there is no sound reason why the probate of a will should be a proceeding *in rem,* and a defense against its probate should be considered as a proceeding *inter partes.*" (p. 52)

Likewise, the Missouri statutes provide for the initial probate of a will in the *Probate* Court, and for a contest of the will by suit in the *Circuit* Court. Nevertheless, the will contest is held to be a proceeding *in rem. McCrary v. Michael* (Mo 1937), 109 SW2d 50, 51; *Miller v. Munzer* (Mo 1952), 251 SW2d 966, 971; *Davis v. Davis* (Mo 1952), 252 SW2d 521, 522. Following are excerpts from the opinions in these cases:

> "A will contest is a proceeding sui generis. It is a suit *in rem.* The sole question to be determined is 'will, or no will'. It has the effect of vacating the probate in

> common form, such as the ex parte proof of wills in the probate court." (109 SW2d 51)
>
> "A will contest is an *in rem* proceeding (citing cases) which operates on the res—the will. Once instituted it cannot be dismissed, but must proceed to an adjudication. (citing cases) The adjudication either establishes or destroys the will, and that adjudication is final." (251 SW2d 971)
>
> "The right to contest a will is entirely statutory. * * *
>
> The proceeding is *in rem* to determine the status of the paper writing, whether or not it is the will of the deceased." (252 SW2d 522)

A will contest is a proceeding *in rem,* not because of the type of court in which it is instituted, but because of the nature of the issue to be determined—"will or no will". These reasons apply with special force in Oregon where the contest is merely a contention of "no will" in the process of proving the will.

But we need not pursue these lines of reasoning any further because the *in rem* character of a will contest in Oregon is established by statute. ORS 43.130, dealing with the subject of *res judicata,* provides:

> "The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:
>
> " (1) In case of a judgment, decree or order against a specific thing or in respect to the *probate of a will* or *the administration of the estate of a deceased person* or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the *will* or *administration,* or the condition or relation of the person.

> "(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive *between the parties,* their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity."

The quoted section was §723, Hill's Annotated Laws of Oregon (2nd Ed.; 1892), the annotations having been prepared by William Lair Hill, one of the ablest and best known lawyers of the period. Following §723 was the following annotation:

> "Subdivision 1 of this section defines the cases in which a judgment will be conclusive as a judgment *in rem,* while subdivision 2 defines the cases in which only parties and privies are bound." (Vol. I, page 571)

Appellant, in effect, asks this court to take the words "the probate of a will" out of sub-section 1, add to them the words "in common form", and then place them in subsection 2 (Op. Br. 78). The result would be that the only decrees of probate which would be binding on the world would be those based on proof of the will in common form —a result so at variance with established concepts as to condemn the process by which it was reached. In any event power thus to revise the statute does not rest in the judiciary, either State or Federal.

7. *Richardson v. Green (1894), 61 Fed 423, Is Not Controlling in This Case*

This case was cited by appellant so many times that he gave page references only as "passim" in his table of cases (p. IV). This is understandable because Judge Knowles'

opinion in the *Richardson* case, and subsequent dictum based upon it, constitutes the only authority which has been found to support appellant's major propositions with respect to the character of will contests in Oregon. We shall therefore comment upon it, although, as pointed out later, the principal jurisdictional questions there involved have been settled in the interim.

Judge Knowles, throughout his opinion, recognized the basic proposition that the Federal courts do not have jurisdiction of a will contest unless it can be instituted as an independent suit *in personam* apart from the probate proceeding. The error in his opinion, as we view it, resulted from his misunderstanding of Oregon probate procedure. For example, he found as *facts*:

(a) That "there was no law in Oregon, when this action was commenced (sometime prior to August 29, 1892; 56 Fed. 384), to warrant any contest upon the validity of a will at the time same was being probated" (p. 482), overlooking the fact that since 1862 the county courts had been given jurisdiction to "take proof of wills" (ORS 5.040 (1)), which included proof both in common form and in solemn form, the latter being used in the event of a contest.

(b) That a decree on a will contest is "binding only on the parties thereto" (p. 428), overlooking ORS 43.130 (quoted above), which is directly to the contrary.

(c) That "a *suit* in the *county court* of Oregon in such matters * * * is a customary exercise of jurisdiction" (p. 428), when in fact no county court of Oregon ever was given jurisdiction of such a suit by the Constitution (App. A) or by statute (App. B) or ever had assumed to exercise any such jurisdiction. See cases cited above (pp. 22-23).

Judge Knowles also referred to the fact that individuals were named as parties to certain early will contests and then inferred therefrom that the contest could not be "an action in rem, in which a contest is made against the validity of the will" (pp. 426-427). We find no authority for the proposition that the designation of the respective interested parties in the caption of a case as proponents or contestants, or similar terms of differentiation, can convert into a suit *in personam* a proceeding which by its essential character is one *in rem*.

But if there is such a rule we invite the Court to look at the captions of the cases cited in Appendix D. It appears that all will contest cases reaching the Supreme Court of Oregon prior to *Cline's Will* (June, 1893), 24 Or 175; 33 Pac 542, were entitled *in that court* by the names of the respective parties who propounded or contested the will. Examples are cited in Judge Knowles' opinion. The Oregon Supreme Court opinions in those cases do not show how the proceedings were entitled in the *county courts*. But beginning with *Cline's Will* and continuing down to date, all will contest cases decided by the Supreme Court of Oregon, with a few scattered exceptions, have been entitled in the probate proceeding, usually but not always,[1] with a sub-title identifying the proponents and the respondents respectively as appellants or respondents. For examples, see Appendix D. In Oregon practice, plenary suits *in personam* are between plaintiffs and defendants, and the name of an estate would have no place in the title of the cause (ORS 13.010, 15.020, 16.030, 16.210). So, if captions characterize the proceeding,

1. Examples of cases entitled only in the estate with no sub-title are: *John's Will* (1896), 30 Or 494, 47 Pac 341; *Booth's Will* (1901), 40 Or 154, 61 Pac 1135; *Skinner's Will* (1902), 40 Or 571, 62 Pac 523; *Holman's Will* (1902), 42 Or 345, 70 Pac 908; *Mendenhall's Will* (1903), 43 Or 542, 72 Pac 318.

it is now clear that from 1893 down to date, will contests could not be plenary suits *in personam*.

We recognize, of course, that on a question of federal law, the decisions of the Federal courts, whether right or wrong, are binding on the state courts. We realize also that in certain classes of cases wherein Federal jurisdiction depends upon the effect of a state statute, the Federal courts may determine for themselves the actual effect of the statute. But the questioned statements of Judge Knowles did not come within either rule. On the contrary, the basic question there considered, as the court itself recognized, was purely one of state law, as to which the Federal Court, as it also recognized, was bound by the statutes and decisions of Oregon. That question, as treated in the *Richardson* case, was actually one of fact, rather than of law; and a mistake in deciding such a question would not, in any event, bind anyone not a party to the decree.

But after all, there is really no occasion now to determine whether the opinion in the *Richardson* case was justified by the statutes then in effect, or by the cases theretofore decided by the Supreme Court of Oregon or by the Supreme Court of the United States. Since that time, there have been several important developments, any one of which would be sufficient to render the *Richardson* case inapplicable as a precedent here. The following are examples:

(a) In 1893, after the *Richardson* case had been tried and decided in the lower court (56 Fed. 384), the Oregon Legislature (prompted, no doubt, by that decision) passed the Act set out in full in Appendix C. Section 4 of that act, now ORS 115.180, specifically authorized will contests in the probate courts. *Mansfield v. Hill* (1910), 56 Or 400,

408; 107 Pac 471, 474; *Florey v. Meeker* (1952), 194 Or 257, 279-280; 240 P2d 1177, 1187.

(b) A long line of will contest cases decided by the Supreme Court of Oregon after the *Richardson* opinion was written, leave no room for doubt that such contests must originate in the probate court as a part of the probate proceeding. See cases cited in Appendix D, noting particularly those beginning with *John's Will* (1896), 30 Or 494; 47 Pac 341, and continuing to the end of the list.

(c) Since the decision in the *Richardson* case, there have been decided by the Supreme Court of the United States many of the more important cases on the issue now before this court. One example is *Sutton v. English* (1918), 246 US 199, which is important here not only because it became the leading case on federal jurisdiction in such matters, but also because it arose in Texas where the juridiction of the probate court is the same, in every respect now material, as that of the probate court in Oregon (246 US 205-206).

(d) In 1921 the Oregon Legislature enacted the Statute, referred to above as the 1921 Act (ante. p. 33) making it clear that will contests are to be tried in the probate court as a part of the probate proceeding.

8. *The 1893 Act—Appendix C*

Appellant contends that this act made no change in the law with resect to will contests except to prescribe a time limitation for instituting contests (Op. Br. 73-75). Bearing in mind the date of the act and the subjects covered, we surmise that it was intended to settle the very questions involved in the *Richardson* case.

Certainly, the act was not intended to be merely a statute of limitations. If that were its purpose, the act has been misunderstood by all of the eminent lawyers and jurists who compiled the six different Oregon Codes (B. & C. 1902; L.O.L. 1920; O.C.A. 1930; O.C.L.A. 1940; O.R.S. 1953) published since 1893; for each of them placed Section 4 among the code sections relating to *wills* rather than among those classified as statutes of *limitation*. In each compilation, all classes of limitations applicable to the various types of plenary suits and actions were codified together as such; and in none was Section 4 of the 1893 act so classified. The reason will appear upon analysis of the 1893 act.

The 1893 Act consisted of four sections. *Section 1* required every custodian of a will to deliver it to the executor, or to the county court, within a stated period. *Section 2* designated the parties who, whether in possession of the will or not, were authorized to petition the court "to have the will proved". *Section 3* provided for compulsory process to require production of a will "in the possession of a third party". *Section 4* then provided:

> "Section 4. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, *contest the same or* the *validity of such will;* and in case a will has been heretofore admitted to probate, such contest may be made at any time within one year from the taking effect of this act; and all proceedings for *such contests or* for *probating wills* must be begun within the time herein specified; *provided,* that if a person entitled to contest the *probate of a will or* the *validity thereof* be laboring under any legal disability, the time in which he may institute *such contest* shall be extended one year from and after the removal of such disability."

There is nothing at all ambiguous in the 1893 act when read in its entirety. Section 4, presently involved, expressly—

(1) declared that any person interested in a will may *contest* either (a) the *validity* of the will, or (b) the *probate* thereof; and

(2) prescribed periods of limitation both (a) for *probating wills* in the first instance[1], and (b) for instituting *contests* after the initial probate.

Appellant treats Section 4 as if it consisted only of the second of these two parts—the limitations. If that were all the Legislature intended to accomplish, that was all that it needed to say. But Section 4 did more than that. It affirmatively declared the right of any interested person to contest the *will,* or the *probate,* in the county court. By necessary implication at least, it required the contest to be a part of the probate proceeding, for *no power was vested in the county court to proceed in any other manner.*

It will be noted that all four sections of the act had reference to just such situations as those involved in *Richardson v. Green.* Had the 1893 act been in effect at that time, Section 1 would have made it the defendant's duty to file the alleged will within a stated time; Section 2 would have authorized the plaintiffs to initiate an appropriate proceeding even though they did not have possession of the will; Section 3 would have provided compulsory process for production of the alleged will; and Section 4 would have cleared up the jurisdictional questions there involved by requiring the will contest to be instituted in the probate court as a part of the probate proceeding.

1. The one year limitation for probating wills in the first instance was continued down through the various subsequent codes (B. & C. 1108; L.O.L. 1143; O.L. 1143; O.C.A. 11-207 and O.C.L.A. 19-208) until removed by Ch. 185, Or. Laws, 1945.

The wording of Section 4 should be carefully noted. The "contest" referred to includes both (1) a contest of the *will,* and (2) a contest of its *probate.* The first would involve such issues as due execution of the will, testamentary capacity, undue influence, etc.; while the second would involve the regularity of the *proceedings* by which the will was admitted to probate. The latter, obviously, would have to be a part of the probate proceeding. As only one form of contest is provided for, the legislative intent to make the entire contest a part of the probate proceeding is clear.

9. *Proof of the Alleged "New Will or Codicil" Could Be Made Only in the Probate Court*

In his third claim appellant alleged vaguely that Mrs. Jackson had executed a "new will or codicil" (R. 69) which "amended or revoked" (Op. Br. 16) the will admitted to probate. Even if that were true, those facts would not entitle appellant to institute a plenary suit in an Oregon court to obtain the relief sought.

The leading cases relied upon by appellant on this point were decided at a time when probate courts in the particular jurisdictions involved had no adequate power, as an incident of their ordinary probate jurisdiction, to require production of concealed or suppressed wills. In Oregon, that power was supplied, if it did not exist before, by Section 2 (now ORS 115.130) of the 1893 Act, set out in Appendix C. This Act gave the probate court all of the powers of discovery and compulsory process needed to meet such a situation as plaintiff undertakes to describe.

The 1893 Act also provided for the probate of lost or destroyed wills (Section 3, now ORS 115.120). A single volume of the Pacific Reporter contains two Oregon cases

involving the probate of lost or destroyed wills. In one, *Miller's Will* (1907), 49 Or 452; 90 Pac 1002, the lost will was admitted to probate. In the other, *McCoy's Will* (1907), 49 Or 579; 90 Pac 1105, probate was denied, but only because of a failure of proof.

Moreover, proof of the existence of a will executed after the one tendered for probate in this case would be ample ground for contesting the will in question. That is shown in many of the will contest cases cited in Appendix D. Obviously, no purported will which has been revoked or superseded by a later one can be established as the "*last* will and testament" of the decedent. So, in Oregon a probate court, as a part of the probate proceeding, has full power to ascertain and determine whether there is outstanding any will entitled to probate. It may be safely said that while a probate proceeding is pending in a probate court, no Oregon court of general jurisdiction would undertake to determine whether a will tendered for probate was in fact the *last* will of the decedent, no matter how the issue might be presented.

The adequacy of a remedy in the probate court for relief from fraud in the probate of a will has been referred to many times by the courts in determining equitable jurisdiction to set aside the probate decree. One example is *Broderick's Will,* cited above (p. 8), wherein the court said:

> "And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." (88 US 510)

> "It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the Probate Court during the proceedings instituted for proving the will, or at any time within a year after probate was granted; and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the Probate Court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The Probate Court was fully competent to afford adequate relief." (p. 517)

Simmons v. Saul (1890), 138 US 439, was a suit in equity brought in the Federal court in Pennsylvania to charge the defendants as trustees because of fraud in the probate of an estate in Louisiana. The prayer was that the probate proceeding be held to be void, that an account be taken for timber sold from certain lands and for other relief. The Supreme Court, after finding that the probate court could have granted full relief on timely application, concluded:

> "The case of *Broderick's Will*, 21 Wall. 503, upon this point is absolutely conclusive against the appellants. That was a bill in equity brought by the alleged heirs-at-law of Broderick to set aside and annul the probate of his will in the probate court of California, and to recover the property belonging to his estate, or to have the purchasers at the executor's sale thereof, and those deriving title from them, charged as trustees for the benefit of complainants. The bill alleged that the will was forged; that the grant of letters testamentary and the orders for the sale of the property were

obtained by fraud, all of which proceedings, as well as the death of decedent, were unknown to the complainants until within three years before the filing of the bill. A demurrer to the bill was overruled and the case was appealed to this court. It was held, Mr. Justice Bradley delivering the opinion, that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court; and that it will not give relief by charging the purchasers at the executor's sale, under the orders of the probate court, and those deriving title from them, as trustees, in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief, in whole or in part.

"With the single exception that that case was brought to set aside the probate of a will, and this was brought to set aside the granting of letters of administration upon a succession, the two cases are as much alike as two photographs of the same person, the lineaments of the alleged fraud being more distinctly brought out in the bill in the case of *Broderick's Will,* than in the bill in this case. Both were bills in equity, brought by the alleged heirs-at-law of a decedent, to set aside and annul a decree of a court of probate, and all the subsequent proceedings, including the order of sale and the sale itself. Both alleged fraud in the procurement of the respective decrees, and knowledge of the fraud by the defendants—actual knowledge in the *Broderick Case,* and constructive knowledge in this case. Both showed a long period of delay—nine years in the *Broderick Case,* and eighteen in this case, and both set up ignorance of the facts as the excuse for laches; and in both cases, according to the averments of the bill in each, the probate court had adequate power to afford relief. See also *Ellis v. Davis,* 109 U.S. 485. We think the decision in that

> case is applicable to the whole of this case upon the question of fraud, and thus obviates the necessity of adverting any further to the question of the establishment of a trust, as against the defendant, in favor of the complainants." (pp. 459-460)

It seems clear, first, that all of the relief which appellant seeks on account of the alleged missing will can be obtained in the probate court, and second, that in such a situation the Federal courts cannot intervene.

10. *Effect of Acts Transferring Probate Jurisdiction to the Circuit Courts*

Beginning in 1919, the Oregon Legislature inaugurated a series of Acts, each applicable to judicial districts of a particular class (based on population, etc.), which resulted in the transfer (a) of all probate powers to the circuit courts in certain judicial districts, and (b) particular probate powers to the circuit courts in certain other judicial districts. See Appendix B.

The important feature of each of these transfers of jurisdiction is that the probate powers thereby vested in the circuit courts were kept separate and distinct from the general jurisdiction of the circuit courts. As observed by the Supreme Court of Oregon in a case transferred under §13-502, O.C.L.A. (now ORS 5.050, App. B):

> "* * * Whenever a probate matter is transferred from a county court to a circuit court under §13-502, O.C.L.A., the circuit court merely acquires a new duty, or, to put it otherwise, the proceeding acquires a new judge whose powers and jurisdiction in the transferred proceedings are identical with and no greater than those which could have been exercised in the premises by the county court whence the matter came, if the

> subject of the contest was within the jurisdiction of the county court and had been tried therein. Such transfer results only in a change of forum without enhancement of judicial power." (*Estate of Ott,* 193 Or 262, 273; 238 P2d 269, 273)

In that case the court quoted its earlier observation in *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666; 182 P2d 969, 977, that "a probate court, whether sitting in its ancient home or in the courtroom of our circuit court, is one of limited jurisdiction." (193 Or 272; 238 P2d 273). And the same quotation was again repeated with approval in a case appealed from the Circuit Court for Multnomah County, Probate Department, to which probate jurisdiction was transferred by ORS 3.340. *Arnold v. Arnold,* 193 Or 490, 500; 237 P2d 963, 968. The case last cited contains a comprehensive review of the prior cases on the same subject and makes it unnecessary for us to cite them here.

Appellant's argument that ORS 3.340 supports his contention that the Circuit Court for Multnomah County has general equity powers while sitting as a court of probate (Op. Br. 71-72) is answered by the following quoted from the opinion in the *Arnold* case:

> "* * * The County Court, sitting in probate, had the exclusive jurisdiction, in the first instance, pertaining to a court of probate (Sec. 13-501, O.C.L.A.), and was a court of general jurisdiction in exercising probate powers. *In re Stroman's Estate,* supra, 178 Or. 109. See cases cited in notes to Sec. 13-501, O.C.L.A., Vol. 2, p. 440. The mode of proceeding was in the nature of a suit in equity as distinguished from an action at law (Sec. 19-101, O.C.L.A.), although the county courts were not 'vested with general equity powers.' *In re Elder's Estate,* 160 Or. 111, 115, 83 P. 2d 477, 119 A.L.R. 302. Nor does this statute vest the

> Circuit Court with general equity powers, but only with such powers in matters 'pertaining to a court of probate', and these, as we have seen, do not include controversies of the kind with which we are here dealing." (193 Or 501-502; 237 P2d 968-969)

PART II—THE SUBSIDIARY CLAIMS

As explained above (p. 5), these subsidiary claims consist of what appellant pleaded as two separate claims — the *First* and the *Second*.

The *First* claim alleged that the trust set up by Article VI is invalid "because the purposes of the proposed charitable trust are so indefinte and uncertain that the same cannot be executed and carried out, and because the discretion accorded the trustees therein is so wide and indefinite that their consciences cannot be held to the carrying out of a definite and certain purpose under the supervision of a court of equity." (R. 58; Op. Br. 15)

The *Second* claim alleged that the charitable trust actually has for its purpose only the result of avoiding taxes and of creating a perpetuity whereby a group of persons may use the trust property for their personal profit with charity as a secondary and subordinate incident. (R. 60; Op. Br. 15-16)

These claims, it will be noted, are based entirely on grounds appearing on the face of the will. They are directed solely at Article VI, and they present only questions of law.

Judge Mathis in his Memorandum of Decision indicated that his court, though without jurisdiction of the will contest, would have jurisdiction of these susidiary claims if no

will contest were involved. Appellant, on filing his amended complaint, did not eliminate the will contest; instead, he reasserted it as set out in his original complaint. And on this appeal, appellant is continuing his contention that Article VI is not the will of the decedent, and that the court below had the right to so determine. In short, appellant at all times has been and still is unwilling to eliminate his "no will" claim from the case.

We shall asssume that the court below would have had jurisdiction to decide the subsidiary claims if the writing on which they are based were not being challenged by appellant on the ground that it was not the will of Mrs. Jackson but of others. That, of course, is not the situation presented here. Appellant is asking the court, sitting in equity, to determine as a matter of law the legal effect of what he claims to be merely a combination of words having no legal significance in any event. There are a number of reasons why, we contend, there is no basis for such a request.

1. *While a contest of a will is in prospect, the courts will not entertain a proceeding to determine the construction, validity or effect of particular provisions in the will.*

It is axiomatic that courts will not decide hypothetical or moot questions; and the rule applies as well to questions which may become moot as to those already known to be so.

Accordingly, the courts have been careful to segregate the probate of a will, on the one hand, from questions as to its construction or validity on the other. And they have been just as careful to avoid determination of questions of interpretation or validity until after the will has been finally proved and established as the decedent's will. The

general trend of the decisions is indicated by the following excerpts from the authorities:

> "In determining whether an instrument proffered for probate is or is not a will, the court cannot ordinarily enter into any consideration of the construction of the will, resolve inconsistencies in the disposition of the property, or construe the provisions of the instrument. These are matters which may properly arise only after the probate of the will." (1 Bancroft's Probate Practice, 2nd Ed., Sec. 132, p. 324)

> "Equity will not construe a will which has not been admitted to probate, or while proceedings for a rehearing of probate are pending." (4 Page on Wills, Lifetime Ed. Sec. 1603, p. 574)

> "Equity will not entertain a suit to construe a will in order to answer merely moot, experimental or abstract questions." (Idem. p. 575)

> "Probate logically precedes construction, for otherwise there is no will to construe." *(Davis' Will* (CCA NY), 75 NE 530, 533)

In discussing the power of equity courts to construe wills, Pomeroy, Equity Jurisprudence (5th Ed.), Vol. 4, Sec. 1157A, 466, states:

> "It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain; * * *"

Borchard, Declaratory Judgment (Sec. Ed.), pp. 702-703, states:

> "In view of the predominant rule that declaratory judgments constitute alternative remedies and are regulated by the ordinary rules of procedure, it is not

surprising to find that the tests which have been set up as a criteria for a cause of action in a proceeding for a declaratory judgment construing a will, do no violence to the conventional concept of a cause of action. Thus, courts have carefully scrutinized will cases to determine whether or not they have jurisdiction of the cause of action before entertaining the suit. They have refused to consider cases in which there was no 'controversy', in which the facts were not ripe for determination, or in which the declaration proposed was looked upon as futile. They have carefully avoided suits designed to receive general advise, and have on occasions been reluctant to accept suits requiring the determination of complicated facts. They have refused to consider suits relating to rights which could vest only in the future and for whose determination there is no immediate need." (pp. 702-703)

One illustrative case is *Ball v. Cooter* (Tenn; 1947), 207 SW2d 340. The executrix under a will filed suit against the defendants, as legatees and devisees under the will, to obtain an interpretation or construction of the will. In the argument on appeal it developed that a will contest was pending. The court said:

"Since the interests of the executrix is wholly dependent upon the establishment of the will she has at present no interest that justifies her in filing the bill, nor is there 'a present controversy' which the court can finally settle by making the declaration sought. * * * The construction of the document is at present 'not justiciable' * * *. A judgment in the circuit court adverse to the will, would render any decree of this Chancery cause purely theoretical. The court will make no declaration in such circumstances. * * * The declaration must be a final determination of rights and will not be given in aid of another proceeding * * *".

"For these reasons courts in other states have expressly held that a declaration will not be made to construe a will 'when another suit is pending on the same problem' * * *". (pp. 341-342)

On rehearing the court said:

"However, according to the petition for rehearing, counsel for both sides agreed that the lawsuit should be held in abeyance until our decision of this Chancery case. By their agreement, we think for the reasons fully set forth in our original opinion, counsel agreed to put the cart before the horse, and that the agreement should have been to hold the Chancery suit in abeyance until the final determination of the suit at law. If that final determination of the lawsuit is to the effect that the will is invalid, no construction of the instrument will be necessary, and if the will be held valid and there remain matters requiring a declaration by the Chancellor, doubtless, then the pleadings in the present suit may be amended to meet the situation." (207 SW2d 343)

So far as we can determine, there is no conflict of authority on this proposition. Not one of the cases cited by appellant holds to the contrary. In some of them the court was careful to point out that no will contest was involved. Without reviewing them all, we point to the following as examples.

One is *Spencer v. Watkins* (CCA 8th; 1909), 169 F 378, heavily relied upon by appellant (Op. Br. 32, 36, 37, 52, 57, 62, 63). The facts have been stated above (p. 19). The court said:

"The suit of the heirs was *not a will contest* in the customary acceptation of that phrase. *No question was involved that would properly arise at the presentation of a will for admission to probate. The heirs did not*

> *seek to annul the probate of the will in question.* They did not challenge the testamentary capacity of the testatrix or the sufficiency as to authentication or form of the written expression of her testamentary purposes. On the contrary, it was averred in their bill of complaint and admitted in the answer that the instruments in question had been duly admitted to probate as the last will and testament of the deceased, and that letters testamentary had been duly issued to the defendant executors." (p. 382)

Another example is *Waterman v. Canal-Louisiana Bank Co.* (1909), 215 US 33, also strongly relied upon by appellant (Op. Br. 25, 42, 46, 53, 57, 62, 63, 72). The issues presented were much like those involved in *Spencer v. Watkins,* supra. The *Waterman* case was a suit by heirs to obtain a determination that certain legacies had lapsed because of the non-existence or inadequate identification of the legatees. In holding that the case was within Federal jurisdiction, the Supreme Court pointed out:

> "The complaint, it is to be noted, *does not seek to set aside the probate of the will* which the bill alleges was duly established and admitted to probate in the proper court of the State." (215 US 46).

Gebhard v. Lenox Library (1907), 74 NH 416, 68 Atl 540, cited and quoted by appellant (Op. Br. 54-55), clearly supports our position; and we submit that this appears from appellant's quotation from the opinion (Op. Br. 55).

The basic error in appellant's reasoning on this point, as we view it, is his assumption that (1) contesting the will, and (2) challenging the validity of its provisions, are not only alternative, but also *concurrent,* remedies. But that is not true. The two remedies cannot be pursued concur-

rently, but only successively, and then only in the order of succession indicated above.

The probate of the Jackson will in common form will not become final until (1) it is reprobated in solemn form, or (2) the time allowed for contest expires, or (3) the party or parties entitled to contest it renounce that right. None of these events has happened. That appellant intends to contest the will if Article VI is found to be valid on its face, is obvious from the allegations in his complaint. He has at all times carefully reserved that right, and his intent to exercise it in *some court* is clear from his own pleadings.

Even in the title to the amended complaint, appellant referred to the defendant Davies and the Bank as "Executors under the *purported* will and testament of Maria C. Jackson, deceased", and to the defendants Davies, Knight and the Bank as "*purported* Trustees appointed by said *purported* last will and testament". He treats Article VI, not as the will of Mrs. Jackson, but merely as her "purported" will.

This case therefore is clearly distinguishable from those wherein a court of general jurisdiction undertakes to construe a will which has been proved and established as such. In all such cases, the final decree of the court will put an end to the controversy for all time. Here, the decree of the court, if for the appellees, will not settle the controversy; it will merely result in another proceeding in another court to obtain a determination that the Federal courts in this case had wasted their time because the instrument on which their adjudication was based never had any legal existence anyway. Plaintiff has cited no authority to justify this or any other court in undertaking to make such a contingent, hypothetical and inconclusive determination.

2. *A Federal court in a diversity case will not undertake to decide claims within its jurisdiction when mingled with related claims outside its jurisdiction if they all are within the jurisdiction of the state court.*

In both *Broderick's Will,* supra, and *Simmons v. Saul,* supra, the complainant sought not only to set aside a will but also other relief which was within the jurisdiction of the Federal courts under the diversity statute. In each case, the Supreme Court sustained or directed dismissal of the entire suit. The reasons are indicated in the above quoted parts of the opinions. (pp. 8-9; 46-48)

Haines v. Carpenter (1875), 91 US (1 Otto) 254, was a suit brought in the Federal court seeking the determination of a variety of questions arising under a will (including a claim that the will was "null and void") for the purpose of avoiding a multiplicity of suits. The lower court sustained a demurrer to the bill and dismissed the suit. The Supreme Court affirmed, saying:

> "A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, *they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States,* and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer." (pp. 256-257)

Ellis v. Davis (1883), 109 US 485, cited above (p. 9) was a suit brought by next of kin in the Federal Court to set aside a will, to recover possession of certain lands, to obtain an accounting of rents and profits, and to cancel a deed made by the decedent during her lifetime. The Supreme

Court, after holding that there was no jurisdiction over the will contest, referred to the other requested relief and said:

> "There is nothing left, therefore, as a ground of support for the present bill, except so much of the case made by it as rests upon the prayer for the cancellation of the sale and conveyance of the Beauvoir estate by Mrs. Dorsey in her lifetime. That relief is claimed in part on the ground of a constructive fraud, growing out of the defendant's relation to her at the time as a confidential agent; but we see nothing in the circumstances as detailed to forbid such a transaction between the parties, and the charges of actual fraud and undue influence applicable to this sale, considered as detached from the rest of the case, are not of such character, even when admitted by the demurrer, as in law would justify a recission. *And as the case for relief as to this sale is not made independently, but only as part of the whole case intended to be presented by the bill, we conclude that it must fail with the rest.*" (pp. 503-504)

In *Sutton v. English* (1918), 246 US 109, cited above (p. 11), the complaint prayed not only that a will be set aside but also for other relief, some of which was within the jurisdiction of the Federal court. In dismissing the suit, the Supreme Court held that the Federal court had no jurisdiction to set aside the will, and that while it had jurisdiction to grant the other relief sought, it should not do so for reasons stated as follows:

> "It will be seen that the contention must be overruled at once, so far as concerns the equitable jurisdiction of the county court, because in the case before us the title to land is involved and the matter in controversy exceeds $1,000. The jurisdiction of the district court is not thus limited, and, under local decisions (*Japhet v. Pullen*, 63 Tex. Civ. App. 157, and cases cited) it may be assumed that an independent suit in

equity could be entertained by that court, and therefore—under the decisions of this court to which reference has been made—might be brought in the United States District Court, for the purpose of construing the joint will of Moses and Mary Jane Hubbard as inefficacious to dispose of the community property, and to set aside, for fraud or on other grounds, the judgment recovered by the defendants English and others against Mary Jane Hubbard establishing their title to that property; and that, if the title of complainants as heirs-at-law of Mary Jane Hubbard could thus be shown, the jurisdiction to partition the property would follow as of course. But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit." (pp. 206-207)

There are several special reasons, plainly indicated in appellant's complaint, for applying here the rule stated in proposition 2 above. The complaint shows that the subsidiary claims were brought into the case as mere incidents of the will contest. They are pleaded as part of the alleged over-all fraudulent scheme. These claims, when read in connection with cross references to other allegations, were framed so that they could be used as further evidence of the undue influence which, appellant claims, induced the testatrix to include Article VI in her will.

Appellant was not content to say, as he needed only to say, that the trust provisions were fatally indefinite and that they violated public policy in the respects claimed; but he

went further and alleged that those provisions were fraudulently designed by Mrs. Jackson's advisers to gain advantages for themselves. All these charges can be made, and doubtless will be, on the will contest. The court below was not required to seperate these subsidiary claims from the rest of the will contest and decide them in advance of the contest. Appellant has cited no case in which such a course has been approved by any Federal court.

3. *It was within the lower court's discretion to decline, under the rules of comity, to decide the subsidiary claims in advance of a determination of the will contest.*

Appellant seems to admit that a probate proceeding is one *in rem*, that it takes control of the *res*, and that the probate court has exclusive possession and administration of the property of the estate (Op. Br. 61).

On the other hand, appellees recognize that courts of general jurisdiction, including Federal courts in diversity cases, normally have jurisdiction to hear and decide such questions as those involved in the subsidiary claims when such determinations do not interfere with the administration of the estate in the probate court. Appellants agree also that the decision of the Federal court in such a case is binding upon the state probate court.[1]

But the mere fact that Federal courts may, in some cases arising out of the administration of estates, have concurrent jurisdiction with the state courts, does not mean that they

1. Appellant charges Judge Mathis with making the "amazing" suggestion that the Oregon court might refuse to recognize the decision of the Federal court in such a situation (Op. Br. 31-32; 44). We think appellant has misread Judge Mathis' Memorandum. All that he said, as we read the Memorandum, was that *while this action is still pending in the Federal court*, the Oregon state court might refuse to consider the will contest or related questions. Certainly, the Oregon court would have that right.

will in all cases exercise that jurisdiction. Certain rules of comity have developed under which a Federal court may stay its hand, even in cases where it would have jurisdiction to act.

The principle of comity has been described by the Supreme Court in a habeas corpus case as:

> "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." (*Darr v. Burford,* 339 US 200, 204, 94 L Ed 761, 70 S Ct 587.)

In *Kelleam v. Maryland Cas. Co.,* 312 US 377, 85 L Ed 899, 61 S Ct 595, an administrator's surety brought suit in the Federal court for exoneration (while a separate action was pending to set aside an order of distribution on grounds of fraud) and obtained the appointment of a receiver to conserve the decedent's property pending the outcome of the dispute between the heirs. The Supreme Court held that the receiver should not have been appointed, since it was not auxiliary to other relief, and made the following observations pertinent to our present inquiry:

> "And even if the bill be contrued as drawing in issue the merits of the controversy between the heirs which the federal court had jurisdiction to adjudicate within the rule of *Arrowsmith v. Gleason,* 129 U.S. 86, and *Sutton v. English,* 246 U.S. 199, 205, that court could not with propriety proceed. A case involving that very controversy was pending in the Oklahoma court. That case did not involve simply an *in personam* action. Cf. *Kline v. Burke Construction Co.,* 260 U.S. 226. It involved an adjudication of rights to specific property distributed pursuant to a probate decree. Cf. *Penn General Casualty Co. v. Pennsylvania, supra* at p. 195.

> The federal court therefore should not have asserted its authority. In such a case it is 'in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' *Pennsylvania v. Williams, supra,* p. 185." (312 US at p. 382)

The principles thus stated are familiar ones, and supported by authorities too numerous to cite in this brief. We think they are peculiarly applicable here. The subject matter of this action (i.e., the will) is already within the jurisdiction of the state probate court. That court will be required to determine whether Article VI is, or is not, the will of Mrs. Jackson. The issues of fraud and undue influence will be decided in the normal way by the only court authorized to decide them. The decision of such issues may determine, to a considerable extent, the course of administration of the estate thereafter. There is no good reason why the Federal court should *at this time* intervene and take over a part of the basic controversy. Since appellant is a minor he is not barred by the six-months' provision in the statute providing for will contests. Accordingly it was proper for the lower court, in the exercise of a decent respect for the functions of a co-ordinate tribunal, to withhold action, even if the subject matter were within the jurisdiction of the Federal court.

Respectfully submitted,

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Appendix

APPENDIX A

Oregon Constitutional Provisions

The Judicial Department of the State of Oregon is set up in Article VII of the State Constitution. That Article, as originally adopted by the people of Oregon in 1857 contained the following provisions:

> "Sec. 1. The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law in accordance with this constitution. * * *"
>
> "Sec. 6. The supreme court shall have jurisdiction only to revise the final decisions of the circuit courts; * * *"
>
> "Sec. 9. All judicial power, authority and jurisdiction not vested by this constitution, or by laws consistent therewith exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers and tribunals."
>
> "Sec. 12. The county courts shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary as may be prescribed by law. * * *" (General Laws of Oregon, 1845-1864, M. P. Deady, pp. 112-114; ORS, Vol. 5, pp. 1018-1020)

Article VII of the Constitution of Oregon was amended by vote of the people in November, 1910. The amended Article contained the following provisions:

> "Section 1. The judicial power of the State shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. * * *"

"Section 2. The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the Supreme Court may, in its own discretion, take original jurisdiction in mandamus, *quo warranto* and habeas corpus proceedings." (General Laws of Oregon, 1911, p. 7; ORS Vol. 5, pp. 1016-1020)

The above quoted provisions of sections 9 and 12 of the original Constitution were not "expressly changed" by the 1910 amendment but have remained in effect except as otherwise indicated in this brief.

APPENDIX B

Oregon Statutes

I. PROBATE JURISDICTION OF OREGON COURTS

(a) *ORS 5.040—County Courts generally.*

County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, to

(1) Take proof of wills.

(2) Grant and revoke letters testamentary of administration and of guardianship.

(3) Direct and control the conduct, and settle the accounts of executors, administrators and guardians.

(4) Direct the payment of debts and legacies, and the distribution of the states of intestates.

(5) Order the sale and disposal of the property of deceased persons. * * *

(b) *ORS 3.340—Circuit Court for Multnomah County (Portland).*

There also is conferred upon, and vested in, the circuit court of a judicial district described in ORS 3.310 full, complete, general and exclusive jurisdiction, authority and power in equity, in the first instance, in all matters what-

soever pertaining to a court of probate, including the construing of, and declaration of rights under, wills and codicils, and therein the determining of question of title to real, personal or mixed properties; and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present such claims to the circuit court, or a judge thereof, for allowance, as provided by ORS 116.525 and 116.530, or he may, and if such executor or administrator demand it in writing, he shall, in the first instance bring a separate plenary action or suit against such executor or administrator on the claim. (Codification of section 11, Chapter 530, Oregon Laws, 1949)

Note: This was the statute construed by the Supreme Court of Oregon in *Arnold v. Arnold,* 193 Or 490; 237 P. (2d) 963. See Appendix C to this brief.

(c) *ORS 3.130—Particular circuit courts other than the circuit court for Multnomah County.*

(1) All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit courts and judges thereof: (here follows a list of four different classifications of judicial districts based upon population and number of counties in the district.)

(2) All matters, causes and proceedings, except those relating to county business, pending in a county court at the time a county or district comes within the scope of this section, shall be transferred to the circuit court for that county. (Codification of Section 4, Chapter 677, Oregon Laws, 1955)

ORS 3.140—Same subject as ORS 3.130.

(1) The circuit courts and the judges thereof in each of these districts or counties described in ORS 3.130, shall

be governed by the existing laws relating to the exercise of the transferred judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, in so far as they may be applicable, as though the circuit courts and the judges thereof had originally been referred to in the existing laws; except that the circuit courts and the judges thereof shall have in the first instance exclusive jurisdiction in equity in all matters pertaining to probate, including the construction and declaration of rights under wills and the determination of questions of title to real, personal or mixed property thereunder, and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present the claim to the circuit court for allowance as provided in ORS 116.525 and 116.530, or he may, and the executor or administrator demands it in writing, he shall, in the first instance bring a separate plenary action or suit against the executor or administrator on the claim.

(d) *ORS 5.050—Jurisdiction of Circuit Courts, other than those referred to in (b) and (c) above, over particular contested matters transferred from the County Courts.*

Any contested probate matter in the county court, other than upon a creditor's claim for less than $500, shall, on motion made and filed by any party in interest, or on motion of the county court, at any time prior to the commencement of the trial of an issue of fact, forthwith be transferred by the county court, by order entered in its probate journal, to the circuit court for the county in which is pending the probate proceeding out of which such contest arose, and it shall therein proceed to be tried and determined in the same manner and with like effect, except as in this section otherwise provided, as though it were in the county court. To that end, the circuit court shall have

exclusively, as to such contested probate matters, all the jurisdiction and powers pertaining to a court of probate possessed in the first instance by the county court. Upon the final determination of such contested probate matter, the county court shall resume jurisdiction thereof, and pending such determination, the county court shall proceed with all uncontested matters in the probate proceeding. * * * An appeal shall lie to the Supreme Court from the decree or other appealable determinative order of the circuit court in such contested matter, the same as from a decree or other determinative order of the circuit court in a suit in equity.

II. PROBATE PROCEDURE GENERALLY

ORS 115.010—Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinquished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

(1) A citation to a party.
(2) A verified petition of a party in interest.
(3) A subpena to a witness.
(4) Orders and decrees.
(5) An execution or warrant to enforce its orders and decrees.

ORS 115.020—Contents of petition to prove will or to appoint executor or administrator. A petition to prove a will or for the appointment of an executor or administrator shall set forth the facts necessary to give the court jurisdic-

tion and also state whether the deceased left a will or not and the names, age and residence, so far as known, of his heirs.

ORS 115.120—Persons entitled to petition for proof of a will. Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is *lost or destroyed* or beyond the jurisdiction of the state or is a nuncupative will. (Emphasis ours)

ORS 115.130—Order for production of will. If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order.

ORS 115.170—Testimony of attesting witnesses; affidavits; depositions. (1) Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. If an attesting witness is outside the reach of a subpena of the court having jurisdiction of the probate of the will such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

(2) However, upon motion of any person interested in the estate within 30 days after the order admitting the will

to probate is made, or upon the discretion of the court within that time, the court may require that the witness making the affidavit be produced before the court for further examination, or if the witness is outside the reach of a subpena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

(3) However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

ORS 115.180—Contest of will. (1) When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest the same or the validity of such will; but, if a person entitled to contest the probate of a will or the validity thereof is laboring under any legal disability, the time in which he may institute such contest shall be extended six months from and after the removal of such disability.

(2) Any will made pursuant to ORS 114.060 may be contested and annulled within the same time and in the same manner as wills executed and proven in this state. (*Note:* ORS 114.060 relates to wills of non-residents with respect to property in Oregon.)

ORS 115.340—Proceedings when will found after administration granted. If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

III. PROOF OF WILLS

ORS 114.010—Term "will" includes codicil. The term "will", as used in this chapter includes all codicils.

ORS 114.020—Who may make wills; limitations. Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy. (Amended by 1955 c. 69 Sec. 1)

ORS 114.110—Express revocation or alteration. A written will cannot be revoked or altered otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration and executed with the same formalities required by law for the will itself; or unless the will is burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person, in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

ORS 116.505—Publication of notice by executor or administrator. Every executor or administrator shall, immediately after his appointment, publish a notice thereof, in some newspaper published in the county, if there is one, or otherwise in such paper as may be designated by the court or judge thereof, as often as once a week, for four successive weeks, and oftener if the court or judge shall so direct. Such notice shall require all persons having claims against the estate to present them, with the proper vouchers within six months from the date of such notice, to the executor or the administrator, at a place within the county therein specified. Before the expiration of such six months

a copy of the notice as published with the proper proof of publication shall be filed with the clerk.

IV. RES ADJUDICATA

ORS 43.130—Judicial orders that are conclusive. The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:

(1) In case of a judgment, decree or order against a specific thing or in respect to the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

APPENDIX C

Act of 1893 relating to the production and contest of wills.

(Laws of Oregon, 1893, pp. 31-32)

AN ACT [H.B. 36]

To Require Custodians of Wills to Deliver the Same for Record and to Provide the Time Within Which the Probate of Wills may be Contested.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the county court having jurisdiction of the estate, or to the executor named therein, and any

such custodian who shall fail or neglect to comply with the provisions of this section, shall be held responsible for any damages sustained by any person injured thereby.

Section 2. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the estate, or is a nuncupative will.

Section 3. If it is alleged in any petition that any will is in possession of a third person, and the court is satisfied that the allegation is correct, and [an] order must be issued and served upon the person having possession of said will, requiring him to produce it at a time and place named in the order. If said third person has possession of the will, and refuses or neglects to produce it in obedience to the said order, he may be punished for contempt as in other cases of disobedience of the order of the court.

Section 4. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of such will; and in case a will has been heretofore admitted to probate, such contest may be made at any time within one year from the taking effect of this act; and

APPENDIX D

List of All Oregon Cases Involving Will Contests

(*Note:* In all cases marked by an asterisk, the ground, or one of the grounds, of contest was fraud or undue influence.)

Greenwood v. Cline (1879), 7 Or 17—Marion*
Hubbard v. Hubbard (1879), 7 Or 43—Marion*
Clark v. Ellis (1881), 9 Or 128—Union*

Shepherd's Will (1927), 121 Or 619, 256 Pac 1119—Multnomah*

Estate of Shaff (1928), 125 Or 288, 266 Pac 630—Marion

Clark v. Clark (1928), 125 Or 333, 267 Pac. 534—Multnomah

Estate of Severson (1928), 125 Or 545, 267 Pac 396—Lane*

Estate of Engle (1929), 129 Or 77, 276 Pac 270—Marion

Stephensen's Estate (1930), 132 Or 234, 285 Pac 224—Marion

Kober's Will (1930), 132 Or 421, 285 Pac 1032—Clackamas

Wayne's Estate (1930), 134 Or 464, 291 Pac 356—Multnomah*

De Lin's Estate (1930), 135 Or 8, 282 Pac 119—Multnomah

De Hass' Will (1931), 135 Or 392, 296 Pac 42—Multnomah*

Linville's Estate (1931), 137 Or 145, 300 Pac 505—Multnomah*

Morely's Estate (1931), 138 Or 75, 5 P2d 92—Marion*

Warren's Estate (1932), 138 Or 283, 4 P2d 635—Clackamas

Miter's Estate (1932), 141 Or 17, 14 P2d 996—Multnomah*

Edward's Estate (1933), 141 Or 595, 17 P2d 570—Multnomah*

Flanders v. White (1933), 142 Or 375, 18 P2d 823—Multnomah

Snyder v. De Remer (1933), 143 Or 414, 22 P2d 877—Yamhill

Fletcher's Will (1934), 147 Or 139, 32 P2d 123—Multnomah

Carlson's Estate (1935), 149 Or 314, 40 P2d 743—Multnomah. Same as 153 Or 327 and 156 Or 597

Knutson's Will (1935), 149 Or 467, 41 P2d 793—Multnomah*

Kelly's Will (1935), 150 Or 598, 46 P2d 84—Multnomah*

Dougan's Estate (1936), 152 Or 235, 53 P2d 511—Multnomah

Wade's Estate (1944), 174 Or 531, 149 P2d 947—Benton*
Provelt's Estate (1944), 175 Or 128, 151 P2d 736—Josephine
Gulick's Estate (1945), 176 Or 610, 159 P2d 610—Lane
Lobb's Will (1945), 177 Or 162, 160 P2d 295—Multnomah* (First appeal, 173 Or 414)
Walther's Estate (1945), 177 Or 382, 163 P2d 285—Tillamook*
Southman's Estate (1946), 178 Or 462, 168 P2d 572—Lincoln*
Perry's Estate (1947), 181 Or 332, 181 P2d 783—Umatilla*
Van Vlack v. Van Vlack (1947), 181 Or 646, 182 P2d 969, 185 P2d 575—Union
Christofferson's Estate (1948), 183 Or 75, 190 P2d 928—Marion*
Massey's Estate (1949), 187 Or 40, 208 P2d 341—Umatilla
Newman's Estate (1950), 187 Or 641, 213 P2d 137—Lake* (First appeal; second appeal in 196 Or 376)
Jackson's Estate (1950), 189 Or 328, 220 P2d 96—Multnomah*
Beer's Estate (1950), 190 Or 15, 22 P2d 1005—Josephine*
Meier's Estate (1950), 190 Or 140, 224 P2d 572—Marion*
Scott's Estate (1951), 191 Or 90, 226 P2d 417—Marion*
Detsch's Estate (1951), 191 Or 161, 229 P2d 264—Multnomah*
Andersen's Estate (1951), 192 Or 441, 235 P2d 869—Multnomah*
Porter's Estate (1951), 192 Or 483, 235 P2d 894—Multnomah*
Urich's Estate (1952), 194 Or 429, 242 P2d 204—Multnomah*
Rosenberg's Estate (1952), 196 Or 219, 246 P2d 858—Umatilla*

Newman's Estate (1952), 196 Or 376, 248 P2d 1069—Lake* (Second appeal; first in 187 Or 641)

Day's Estate (1953), 198 Or 518, 257 P2d 609—Tillamook*

Hill's Estate (1953), 198 Or 307, 256 P2d 735—Polk*

Peterson's Estate (1954), 202 Or 4, 271 P2d 658—Multnomah

Pierson's Estate (1954), 202 Or 6, 272 P2d 616—Grant

Frederick's Estate (1955), 204 Or 378, 282 P2d 352—Multnomah*

Congy's Estate (1955), 204 Or 512, 284 P2d 758—Polk*

Estate of James H. Miller (1956), 206 Or 358, 269 P2d 524, 292 P2d 504—Marion*

Wagner's Estate (1956), 208 Or 207, 300 P2d 783—Sherman*

Keenan's Estate, Meister v. Finley et al, (1956), 208 Or 223, 300 P2d 778—Marion*

Salter's Estate, Salter v. Salter (1957), 209 Or 536, 307 P2d 515—Jackson

Harritt's Estate (1957), 210 Or 354, 311 P2d 450—Marion*

Roblin's Estate (1957), 210 Or 371, 311 P2d 459—Marion*

Smith's Estate, Estate of William H. Smith, Smith et al v. Smith, (1958) , 212 Or 481, 320 P2d 275—Jackson*

Reddaway's Estate, Reddaway v. Reddaway, (1958), 67 Or Adv. Sh. 69, 329 P2d 886—Clackamas*

Quaid Estate (1958), 68 Or Adv. Sh. 183, 335 P2d 86—Multnomah